Supreme Court, U. S.
FILED
JUL 27 1977

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1784

THOMAS MUSTO and MICHAEL ASTARITA,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

On April 30, 1976, in the New York State Supreme Court, New York County, Thomas Musto and Michael Astarita each pleaded guilty to PROMOTING GAMBLING IN THE FIRST DEGREE (N.Y. Penal Law §225.10) and PROMOTING GAMBLING IN THE SECOND DEGREE (N.Y. Penal Law §225.05). On July 28, 1976, the court sentenced each petitioner to a

three-month term of imprisonment on the convictions for promoting gambling in the first degree. On the convictions for promoting gambling in the second degree, each petitioner was sentenced to a two-month term of imprisonment and fined $1,000. By orders entered on January 31, 1977, the Appellate Division, First Department, of the New York State Supreme Court unanimously affirmed these judgments without opinions. 55 A.D. 2d 894 (1st Dept. 1977). On March 16, 1977, leave to appeal the Appellate Division orders to the New York State Court of Appeals was denied. Musto and Astarita now seek a writ of certiorari to review the orders of the Appellate Division.

Introduction

Between September and December, 1973, Musto and Astarita accepted illegal wagers on sporting events. On eight days in that period, the petitioners accepted wagers in excess of $100,000. On each day between September 25th and November 3rd, the petitioners accepted wagers in excess of $5,000. In a forty-count indictment filed on August 19, 1974, Musto and Astarita were charged with one count of conspiracy to promote gambling in the first degree and thirty-nine counts of promoting gambling in the first degree. New York County Indictment No. 4072/74.

Part of the investigation in this case consisted of court-authorized electronic surveillance. New York County Eavesdropping Warrants 73/72, 73/75 and 73/79. Prior to trial, the petitioners moved to suppress the evidence derived from Eavesdropping Warrant 73/72. The petitioners alleged, *inter alia,* that the prosecutor's affidavit in

support of the warrant was based on the false statements of an undercover policeman. Without a hearing, the court (B. ROBERTS, J.) denied the motion in December 1975. In January, 1976, the petitioners again moved to suppress the evidence derived from Eavesdropping Warrant 73/72, and the court denied the motion.

On April 28, 1976, Musto and Astarita pleaded guilty to promoting gambling in the first and second degrees. On July 28, 1977, the petitioners were each sentenced to concurrent terms of imprisonment of three months and two months and fined $1,000.

On appeal to the Appellate Division of New York State Supreme Court, the petitioners asserted that it was error for the trial court to deny the first suppression motion without a hearing to determine whether Eavesdropping Warrant 73/72 was based on the false statements of an undercover police officer. Specifically, petitioners asserted that a hearing was required by New York state case law. Petitioners declined to challenge the trial court's decision to deny, without a hearing, the second suppression motion. Petitioners' brief in the Appellate Division, at 11.

The Instant Petition

Musto and Astarita ask this Court to grant a writ of certiorari to review the orders of the Appellate Division, First Department, of the New York State Supreme Court. Under New York state law, a defendant is entitled to a hearing to challenge the truthfulness of the allegations in the affidavit supporting a warrant. A hearing is required

when the defendant challenges the veracity of the affiant to the warrant. A hearing is not required when, as in the instant case, the defendant challenges the veracity of the affiant's source of information. Musto and Astarita contend that this New York rule deprives them of the hearing to which they are entitled under the Fourth and Fourteenth Amendments to the United States Constitution. It is argued that a hearing is constitutionally required whenever a defendant alleges that an affiant's source of information has lied. Petitioners' claim to this Court was not raised in the court below.

The Proceedings in the Trial Court

Eavesdropping Warrant 73/72

On September 26, 1973, the Honorable BURTON ROBERTS issued an eavesdropping warrant which authorized the District Attorney of New York County to intercept conversations transmitted over telephones with the assigned numbers 472-2990, 472-2452 and 744-2218. The telephones were located in apartment 2B at 324 East 84th Street. The authority to eavesdrop was limited to conversations pertaining to illegal gambling and to conversations in which Thomas Musto, Michael Astarita or their co-conspirators were a party (Eavesdropping Warrant 73/72). On October 10 and November 5, 1973, Justice ROBERTS renewed and amended the September warrant (Eavesdropping Warrants 73/75 and 73/79).

The basis for the original warrant, Eavesdropping Warrant 73/72, was an affidavit submitted by Assistant District Attorney Ronald Goldstock. The prosecutor stated that he

was investigating an East 84th Street bookmaking operation managed by Thomas Musto and Michael Astarita. According to the records of the New York City Police Department, Michael Astarita was a known gambler who had been arrested three times for operating a bookmaking "wireroom" in Manhattan.* Astarita's known associate was Thomas Musto, who had been arrested four times for operating wirerooms. Astarita and Musto had been arrested together twice.

The prosecutor's affidavit established probable cause to believe that Musto and Astarita were accepting wagers over telephones located at 324 East 84th Street. The prosecutor averred:

> 4. A police officer, shield #21590, who is currently acting in an undercover capacity has informed me that during the course of his official duties he has occasion to meet Michael Astarita, and has been taken into his confidence with respect to his illegal gambling activities. Astarita told the officer early in September 1973, that he (Astarita) was about to operate a wireroom using a telephonic set-up which was designed to insulate him from the action of law enforcement agencies. According to Astarita the set-up involves the use of two telephones which, while located in apartment 2B of 324 East 84th Street, New York City, are officially listed in Telephone Company records as having been installed in another premises. Thus, Astarita noted, should any investigating agency learn of numbers 472-2990 and 472-2452, that would have been given to his customers to call and place their wagers, the agency would still be unable to discover the location of the wireroom, and seize the bookmaking records. I am

* A wireroom is a bookmaking operation in which bets are accepted over telephones.

> further informed by the undercover police officer that Astarita disclosed that for bookmaking purpose, he maintained a third telephone in the wireroom (correctly listed) which would be used for outgoing calls, and the number of which would not be made available to customers (A72).*

According to the prosecutor's affidavit, subsequent investigation corroborated the information which had been supplied by the undercover police officer. The records of the New York Telephone Company indicated that telephones with the numbers 472-2990 and 472-2452 had been installed on the ground floor at 309 East 83rd Street. A telephone with the number 744-2218 had been installed in apartment 2B at 324 East 84th Street. Moreover, surveillance indicated that Musto was connected to the activity in the 84th Street apartment. Detective Richard Klev informed the prosecutor that, on September 24, 1973, Detective Klev observed Musto leave the 84th Street building at 2:06 p.m., "percisely at the close of the afternoon bookmaking hours."

Additionally, the application for Eavesdropping Warrant 73/72 was supported by an affidavit submitted by Police Sergeant Alfred Welsome. Officer Welsome stated that, pursuant to an eavesdropping warrant issued in a separate investigation, officers of the Police Department were eavesdropping on two telephones located in a 42nd Street bookmaking wireroom. On at least three occasions, clerks in the 42nd Street wireroom had called either telephone number

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* Undercover police officer shield #21590 was subsequently identified as Police Officer John Talt. At the time of his conversation with Astarita, Officer Talt had assumed the role of a fellow bookmaker. Officer Talt was still operating in an undercover capacity when Assistant District Attorney Goldstock applied for Warrant 73/72.

472-2990 or 472-2452 and placed bets. On one occasion, the clerks in the 42nd Street wireroom spoke to an individual named "Michael" and on two occasions, they spoke to "Tom."*

The Suppression Motions

Prior to trial, the petitioners moved to controvert Eavesdropping Warrant 73/72, the warrant which authorized the interception of conversations occurring over the telephones in the East 84th Street wireroom. The sole support for the motion was an affirmation signed by the petitioners' attorney. Among the reasons for controverting Warrant 73/72, the attorney alleged that Assistant District Attorney Goldstock's affidavit in support of the warrant was based, in part, on the false statements of an undercover police officer.

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* Telephone conversations originating on the telephones in the 42nd Street wireroom were intercepted pursuant to Eavesdropping Warrant 73/69. On September 18, 1973, Justice ROBERTS authorized the District Attorney of New York County to intercept conversations transmitted over telephones with the assigned numbers 594-6466 and 736-2552. The telephones were located in room 744-A at 55 West 42nd Street. The authority to intercept was limited to conversation involving illegal gambling and conversations in which Frank Reid, Bucky (LNU), Larry (LNU) or their coconspirators were a party (Eavesdropping Warrant 73/69).

Probable cause for the eavesdropping warrant was established by affidavits submitted by Sergeant Welsome, F.B.I. Agent Maurice Roussell and Assistant District Attorney Goldstock. Sergeant Welsome stated that officers under his command had, among other things, occupied a room across the street from room 744-A and made detailed observances of activity indicative of bookmaking. Agent Roussell stated that he had been told by an informant, whose previous information had resulted in twenty convictions, that the informant had recently called telephone numbers 594-6466 and 736-2552 to discuss gambling matters with Bucky (LNU) and Larry (LNU). According to Agent Roussell's affidavit, Bucky told the informant that Frank Reid was the manager of the 42nd Street wireroom. Assistant District Attorney Goldstock stated that he was in charge of the investigation of Frank Reid's gambling activities.

As previously noted, the prosecutor's affidavit contained information received from an undercover police officer. According to the prosecutor's affidavit, Astarita had told the officer, who was disguised as a fellow bookmaker, that Astarita was about to operate a wireroom in apartment 2B at 324 East 84th Street.

In the affirmation supporting the motion to suppress, the petitioners' attorney alleged that the undercover officer had lied to the prosecutor. Specifically, the attorney alleged that "the conversation that the undercover police officer related to Mr. Goldstock never did take place and that if in fact said officer did have information, it was not as a result of any conversation with Michael Astarita." The attorney described the basis for his allegation as follows: "These allegations by the undercover police officer are[,] based upon information and belief, investigation and conversations with the defendant, perjurious, in that they did not in fact take place."

On December 8, 1975, Justice ROBERTS denied the defendants' motion. Initially, the court noted "that to obtain a hearing on the issue of perjury the defense, which has the burden of proof, must allege *facts* which throw doubt on the veracity of the allegations in support of the warrant." The court then held that the affirmation of the defendants' attorney was "not a sufficient factual basis upon which to predicate a hearing." The motion to controvert Warrant 73/72 was denied.

Subsequently, the defendants again moved to controvert Warrant 73/72. The grounds asserted in that motion are not relevant to the issues in this petition. On March 3, 1976,

Justice ROBERTS denied, without a hearing, the defendants' second suppression motion. The trial court's denial of the second motion was not challenged on petitioners' appeal in the New York State courts.

POINT I

This Court has no jurisdiction to review the petitioners' claim that a hearing was required by the federal constitution.

One who petitions this Court to review the judgment of a state court must establish that the Court has jurisdiction to do so. *Street* v. *New York,* 394 U.S. 567, 581-82 (1964); *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952). Petitioners seek to invoke the jurisdiction vested in this Court by 28 U.S.C. §1257 (3). Petition at 3.* Under this provision, petitioners are required to demonstrate that the state court judgments which they ask this Court to review rested upon federal grounds. Indeed, where "it appears that the judgment [of the state court] *might* have rested on a non-federal ground," this Court has held that it has no jurisdiction. *Stembridge* v. *Georgia,* 343 U.S. at 547 (emphasis in the original). To give effect to this requirement, the rules of this Court require that one who petitions the Court for certiorari must state "the way in which [the federal questions] were passed upon by the [state] court." Supreme Court Rules, rule 23 (1) (f).

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* We presume that petitioners' reference to 28 U.S.C. §1257(2), which empowers this Court to review state court decisions by appeal, is a mistake. Petition at 3. At every other point in their petition, Musto and Astarita characterize the instant case as a petition for a writ of certiorari.

Petitioners have not, and cannot, satisfy this requirement. There is no indication that the state appellate court dealt with petitioners' federal claim. In the trial court, petitioners argued that a hearing to controvert the warrant was required by New York state case law. In the Appellate Division of the Supreme Court, petitioners argued that, by denying their motions without a hearing, the trial court had misinterpreted New York state case law. In arguing that a hearing was required, petitioners did not even refer to the federal constitution. Petitioners' brief to the Appellate Division at 4-15. In short, the federal claim which petitioners seek to raise before this Court was never presented to the Appellate Division, First Department. Therefore, this Court has no power to consider that claim. *Street* v. *New York,* 394 U.S. at 582, *supra.*

Even if the federal claim had been raised, this Court has no jurisdiction since the Appellate Division order might have rested on an independent and adequate state ground. A defendant in New York State is not automatically entitled to a suppression hearing. The defendant's motion to suppress "must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds." N.Y. Criminal Procedure Law §710.60 (1). The purpose of this rule is to effectuate New York State's interest in discouraging the waste engendered by baseless pre-trial hearings. *See generally Henry* v. *Mississippi,* 379 U.S. 443 (1965).

In the instant case, petitioners' attack on the credibility of the affiant's source of information was supported solely by an affirmation of their attorney. In an affirmation sub-

mitted in support of the motion to suppress, petitioners' counsel asserted that the "allegations by the undercover police officer are[,] based upon information and belief, investigation and conversation with the defendant, perjurious, in that they did not in fact take place." The trial court held that counsel's conclusory allegation lacked a clearly stated factual basis. Therefore, pursuant to N.Y. Criminal Procedure Law section 710.60 (1), the allegation was deemed insufficient to warrant a hearing.

Although the Appellate Division did not write an opinion, it is likely that the Appellate Division orders were based on the trial court's explicit determination that the allegation in support of petitioner's motion was too vague to require a hearing. The New York statutory provision which requires that allegations be supported by facts is distinct from the New York rule, based on case law, which requires that allegations of perjury be directed at the affiant and not at the affiant's source of information. Since the orders of the Appellate Division might have rested on a statutory provision which is not challenged in this petition, this Court has no jurisdiction to review petitioners' federal claim regarding the New York rule on perjury. *Cf. Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952).*

* Petitioners assert, however, that the trial court's determination regarding the factual sufficiency of defense counsel's allegations was wrong. Petition at 15, 16. Petitioners do not argue that N.Y. Criminal Procedure Law section 710.60 (1) violates the federal constitution by requiring that defendants make concrete factual allegations in order to be entitled to a hearing. Rather, petitioners seem to argue that the New York trial court erroneously applied New York statutory law. The mere fact that a case might have been wrongly decided is, of course, not sufficient to invoke the jurisdiction of this Court.

In any event, the trial court correctly decided that counsel's allegations were, under New York law, too vague to warrant a hearing.

(footnote continued on next page)

POINT II

The Constitution does not require a hearing when a defendant alleges that an affiant's source of information was a liar.

A New York state defendant is entitled to a hearing when he alleges that the allegations in support of a warrant are perjured. However, a hearing is required only when the defendant "attacks the veracity of the * * * affiant, and not where * * * the credibility of the source of information is challenged * * * [A hearing] is only available to the defendant who claims that the affiant has perjured himself." *People* v. *Slaughter,* 37 N.Y. 2d 596, 600 (1975); *People* v. *Glen,* 30 N.Y. 2d 252, 262, *cert. denied,* 409 U.S. 849 (1972); *People* v. *Solimine,* 18 N.Y. 2d 477, 479-80 (1966); *People* v. *Alfinito,* 16 N.Y. 2d 181, 185-86 (1965). Musto and Astarita contend that this New York rule deprives them of the full and fair hearing to which they are entitled under the Fourth and Fourteenth Amendments.

The rule of the New York Court of Appeals is similar to the rule of every federal Court of Appeals. A hearing is required when the defendant challenges the credibility of the affiant. A hearing is not required when the defendant attacks the credibility of the affiant's source of information. *See United States* v. *Belculfine,* 508 F. 2d 58, 63 (1st Cir.

As the trial court held, counsel's affirmation was "enshrouded in claims of 'information and belief' and 'investigation'." It was impossible to determine whether the allegation was based on some vague "information and belief," or an investigation (the details of which were not disclosed), or a conversation with the defendant. In short, the source of defense counsel's affirmation was deliberately obscure and, therefore, insufficient.

1974); *United States* v. *Dunnings*, 425 F. 2d 836, 839-40 (2nd Cir.), *cert. denied*, 397 U.S. 1002 (1970); *United States* v. *Armocida*, 515 F. 2d 29, 41 (3rd Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States* v. *Lee*, —— F. 2d ——, 19 CrL 2193 (4th Cir. 1976); *United States* v. *Thomas*, 489 F. 2d 664, 669-70 (5th Cir.), *cert. denied*, 423 U.S. 844 (1975); *United States* v. *Luna*, 525 F. 2d 4, 8-9 (6th Cir.), *cert. denied*, 424 U.S. 965 (1976); *United States* v. *Smith*, 499 F. 2d 251, 255 (7th Cir. 1974); *United States* v. *Marihart*, 492 F. 2d 897, 899-900 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States* v. *Prewitt*, 534 F. 2d 200, 202 (9th Cir. 1976); *United States* v. *Rael*, 467 F. 2d 333, 336 (10th Cir.), *cert. denied*, 410 U.S. 956 (1973); *United States* v. *Thornton*, 454 F. 2d 957, 967-70 (D.C. Cir. 1971).*

The reason for this rule is obvious. The narrow purpose of the exclusionary principle is to deter government officials from engaging in unreasonable searches and seizures. This purpose is not furthered by suppressing evidence merely because an informant gave false or inaccurate information to a prosecutor-affiant who had a firm basis for crediting the accuracy of both the informant and his information. *Cf. Stone* v. *Powell*, 428 U.S. 465, 486-87 (1976); *see also* Kipperman, *Inaccurate Search Warrant Affidavits*

* Where the defendant alleges that an affiant has recklessly misstated a fact, most federal Courts of Appeals have held that the defendant is entitled to a hearing. *See e.g., United States* v. *Carmichael*, 489 F. 2d 893, 988-89 (7th Cir. en banc 1973). The New York Court of Appeals has never ruled on a situation involving allegations that an affiant's statements were reckless rather than perjurious. In any event, the New York rule and the federal rule is identical regarding the issue in this petition. When a defendant alleges that a warrant was issued on the basis of perjurious or reckless statement, the defendant, in order to be entitled to a hearing, must direct his allegations at the affiant and not, as in the case at bar, at the affiant's source of information.

As A Ground For Suppressing Evidence, 84 Harvard L. Rev. 825, 830-31 (1971). To require a hearing on the facts of this case would not greatly deter unlawful government activity but would increase the number of pre-trial proceedings unrelated to the determination of guilt or innocence.

In sum, the lower courts unanimously accept the rule attacked by petitioners. The unanimous acceptance is founded on sound reasoning. Therefore, there is no reason for this Court to review this case.

Conclusion

The petition should be denied.

Respectfully submitted,

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